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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 79-5267

ANTONIO PEREZ,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections,

Respondent.

ORIGINAL COPY

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## OPINIONS BELOW

The order of the United States District Court for the Southern District of Florida granting habeas corpus relief is reported as Perez v. Wainwright, 440 F.Supp. 1037 (S.D. Fla. 1977). The opinion of the Fifth Circuit Court of Appeals reversing the district court is reported as Perez v. Wainwright, 594 F.2d 159 (5th Cir. 1979), rehearing denied, 599 F.2d 1054.

## STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, before the Honorable George Orr, of robbery, in violation of Florida Statutes (1973) §813.011. On August 14, 1975, he was adjudged guilty and sentenced to be imprisoned for a period of seven years. (Respondent's Appendix, p. 54).

Petitioner was insolvent at all times and was therefore originally represented in the trial court by the Office of the Public Defender. Subsequently, however, Petitioner's representation was undertaken by private counsel who had been retained by Petitioner's parents. It was by this privately retained counsel that Petitioner was represented at trial. Following the conviction, no appeal was instituted.

On October 29, 1975, Petitioner, represented by a second privately retained counsel, filed a motion in the trial court, which was styled as "POST-CONVICTION RELIEF," and which was apparently intended to function as a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850. In this pleading, it was asserted that "the attorney for the Defendant failed to file the necessary motions as to



protect the Defendant to his rights to appeal." This motion was denied on November 12, 1975. (Respondent's Appendix, p. 55). (The order of the district court is in error in stating that this motion was denied on September 15, 1975.) The denial of this motion was not appealed.

On February 17, 1976, Petitioner filed a petition in Florida's Third District Court of Appeal seeking a writ of habeas corpus or, in the alternative, that the petition be treated as a timely notice of appeal. In this petition, he asserted that he at all times desired that an appeal be undertaken, that his counsel had informed him at sentencing that he would take the necessary steps to institute an appeal and that he relied upon his counsel to pursue the appeal. This petition was denied on February 19, 1976, due to the fact that Petitioner was represented by private counsel at the time of trial. (Respondent's Appendix, p. 55).

Petitioner instituted the proceeding from which this case arises by filing a petition for writ of habeas corpus on December 9, 1976, in the United States District Court for the Southern District of Florida, in which he made essentially the same assertions as in the petition filed in the Florida appellate court. Pursuant to an order to show cause, Respondent filed a memorandum of law and motion to dismiss, (Respondent's Appendix, pp. 91-100), in which it was contended that Petitioner had not exhausted his state remedies. In an order filed September 1, 1977, setting an evidentiary hearing, Judge Sidney M. Aronovitz rejected that argument. Subsequently, on October 27, 1977, Judge Aronovitz entered an order which concluded that although the fact that Petitioner was not able to appeal was not due to state action, Petitioner was

entitled to relief because the conduct of his counsel was "so grossly deficient as to render the proceedings fundamentally unfair." This finding was based primarily on the fact that Petitioner's counsel at sentencing in seeking supersedeas bond announced to the court that a notice of appeal had already been filed, although this was not the case. Respondent timely sought rehearing, or, in the alternative, a stay pending appeal. On December 1, 1977, an order was entered denying rehearing and granting a stay pending appeal.

Respondent appealed to the United States Fifth Circuit Court of Appeals, which reversed the district court, holding that Petitioner had exhausted state remedies, but finding that fundamental unfairness had not occurred. This proceeding follows.



## SUMMARY OF ARGUMENT

Respondent asserts four reasons in opposition to the petition for a writ of certiorari.

Respondent initially contends that since Petitioner, in the lower courts, claimed only that he was entitled to relief under the standard adopted by the United States Fifth Circuit Court of Appeals for reviewing claims of the nature dealt with by this case, a position which he now concedes is incorrect, his present attack, which is directed to the standard itself, should not be considered. This argument is based primarily on cases which stand for the proposition that issues not raised in the lower courts will not be considered by this Court.

The second aspect of Respondent's argument is concerned with the fact that this case deals with a claim of ineffective appellate counsel, a claim involving a right which, while certainly significant, is not as fundamental a right as is that regarding trial counsel. It is Respondent's position that this Court should not establish a standard to be applied to the circumstances here until such time as it has adopted a standard to be applied to representation by trial counsel. Respondent's reasoning is that whatever standard is to be applied to claims of the sort presented by Petitioner would be a less stringent standard than would apply to the trial situation. Thus, a decision in this case would have the effect of creating an exception to a general rule, even before the general rule is adopted, and would create a precedential impediment to a full analysis of the broader issue when it is ultimately considered. In this regard, Respondent also notes that

consideration of the more basic standard in this proceeding would not be proper, as such consideration would be contrary to this Court's long established policy of not formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

Respondent also maintains that the issue presented by this case should not be considered by this Court until such time as the lower courts have had an opportunity to consider the effect on the appropriate standard of the sentiments expressed by this Court in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), a case which has not been considered as it relates to this issue by any of the courts which decided the cases cited by Petitioner as conflicting with the opinion here. Respondent contends that the fact that a defendant, by choosing to represent himself, waives his right to claim that he received ineffective representation, the principle of Faretta with which Respondent's argument is concerned, must be considered in determining what standard is applicable in reviewing claims of ineffective assistance of, as here, private counsel. This conclusion is based on the fact that in either of these situations the representation is that chosen by the defendant and the fact that the state is equally powerless in either case to insist that the defendant do other than what he has chosen. Given these facts, questions arise as to what effect a defendant's decision to engage a given attorney should have on the applicable standard. These questions have not been considered by the lower courts and therefore Respondent suggests that review by this Court of this issue would presently be premature, as this Court would be setting a standard without the benefit of assessment by any appellate court of this issue in light of all the



relevant precedent of this Court and would be doing so in a situation in which a conflict of standards might not even exist after due consideration of the subsequent precedent at the appellate level.

Finally, Respondent submits that a development in the law of the state of Florida, which occurred subsequent to the filing of the opinion sought to be reviewed, mandates the conclusion that Petitioner has failed to exhaust his state remedies and is therefore not entitled to federal habeas corpus relief. Respondent has consistently maintained throughout the lower court proceedings that Petitioner should be required to present his claims to the Florida Supreme Court, since, under the circumstances of this case, that is the only state court with the authority to grant the relief sought. Recently, it has become apparent that that court is indeed willing to review the sort of issue presented here, as it has undertaken a reassessment of the position it took in 1967, the last time it considered this issue, that such claims would not form a basis for relief. This reassessment has been undertaken following dismissal on exhaustion grounds of a federal habeas corpus action alleging error similar to that alleged here, and a request by the state that such reconsideration occur. It has thus become apparent that Petitioner has not exhausted state remedies. Indeed, the federal court's dismissal of the case now before the Florida Supreme Court was affirmed by the very appellate court which held that Petitioner had exhausted state remedies. Given this change in the law, it is apparent that review on the merits would only lead to a finding that exhaustion has not occurred. Therefore, certiorari would not be appropriate.

## ARGUMENT

It is Respondent's position that there exist four reasons why certiorari should not be granted in this case.

### A

### PETITIONER'S FAILURE TO RAISE HIS PRESENT CLAIMS IN THE LOWER COURTS SHOULD ACT TO PRECLUDE THEIR CONSIDERATION AT THIS TIME.

Petitioner has conceded that under the facts of this case, the decision of the Fifth Circuit Court of Appeals, Perez v. Wainwright, 594 F.2d 159 (5th Cir. 1979), reh. denied, 599 F.2d 1054, was "compelled by the [prior] decisions of" that court. (Petitioner's petition [hereinafter referred to as "P"], p. 13). This fact is also apparent from the opinion itself, in which the court noted that it was "precedent-bound" to rule in the manner it did, although if it was "approaching the issue for the first time," it would hold differently. 594 F.2d at 160-161, 163.

In presenting his argument in the lower courts, however, Petitioner did not make this same concession. Rather, he argued that applying the standard which the Fifth Circuit adopted in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974)(en banc), he was entitled to relief. (See Petition for Writ of Habeas Corpus and Exhibits and Memorandum in support thereof, Petitioner's Appendix, Exhibit E, and Petitioner's brief on appeal, Respondent's Appendix, pp. 1-46.) At no time did Petitioner challenge the propriety of the standard itself, arguing instead only that its application entitled him to relief. This fact is true even as regards Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, (Petitioner's Appendix, Exhibit C), in which it would have been clearly appropriate to raise



such a challenge if the standard was to be questioned. In this regard, it is significant to realize that given the previously noted sentiments of the panel which decided the case, this case was one in which the likelihood of success had a challenge been made to the standard was clearly much greater than it would be in most situations. Yet, Petitioner still chose not to make such an argument.

In the present proceeding, Petitioner, as noted, concedes the propriety of the circuit court's ruling under the accepted law of the circuit, but attacks, for the first time, the standard itself. Such an approach is an inappropriate manner in which to bring this matter before this Court and for that reason, certiorari should be denied.

It is well established that an issue not raised in the lower courts will not be considered by this Court. See Miree v. DeKalb County, Ga., 433 U.S. 25, 33-34, 97 S.Ct. 2490, 2496, 53 L.Ed.2d 557, 565-566 (1977); Tennessee v. Dunlap, 426 U.S. 312, 316, 96 S.Ct. 2099, 2101, 48 L.Ed.2d 660, 665, n. 3 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397-398, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619, 627 (1971); Adickes v. S.H. Kress and Company, 398 U.S. 144, 147, 90 S.Ct. 1598, 1602-1603, 26 L.Ed.2d 142, 148, n. 2 (1970); Wisconsin v. Federal Power Comm., 373 U.S. 294, 307, 83 S.Ct. 1266, 1274, 10 L.Ed. 2d 357, 367 (1963); Lawn v. United States, 355 U.S. 339, 362-363, 78 S.Ct. 311, 324-325, 2 L.Ed.2d 321, 327, n.16 (1958); Husty v. United States, 282 U.S. 694, 701-702, 51 S.Ct. 240, 241-242, 75 L.Ed. 629, 633 (1931); Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996, 1000 (1927).

There can be little doubt that the broad attack on the Fifth Circuit's standard and the narrow question of whether the facts here required the granting of releif under that

standard are two different and distinct issues. This Court recognized such a distinction in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), in which it noted that the petition for certiorari presented issues going only to the question of whether the circuit court there had misapplied a previous decision of this Court, Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and distinguished those claims from the issue as to the legal standards applicable to the type of case in question.[1]

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[1] In Washington v. Davis, supra, this Court did consider the issue regarding the legal standards, but it did so under the authority of Supreme Court Rule 40 (1)(d)(2), which provides that this Court "may notice a plain error not presented" in a jurisdictional statement or a petition for certiorari. This provision is inapplicable here, since this case deals with a failure to raise the claim in the lower courts, not with a failure to present it to this Court, the situation dealt with by the rule.

In any event, it is clear that the present case does not present a "plain error" situation. It does not deal with a situation in which a uniform standard has been adopted, making it more or less "plain" whether that standard has been misapplied. Rather, it deals with an area in which various standards have been employed and in which the facts of the case so clearly warrant the conclusion reached under at least one of those standards, that of the Fifth Circuit, that Petitioner has conceded that the court's result was "compelled" when measured in that context. (P. 13).

Thus, in order to find error, this Court would have to conclude that the standard applied is incorrect and that the facts of the present case would call for relief under the new, as yet undefined, standard. Any process which would lead to such a result would obviously involve substantial and careful evaluation of the various constitutional considerations, and, certainly, given the very breadth and nature of this process, any error found could hardly be termed "plain."

This conclusion is also supported by the fact that the remedy sought by Petitioner, direct review in the state courts of his state criminal conviction, is not even a matter which is a necessary element of due process, McKane v. Durston, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894), and which is not a matter to which an individual has a federal constitutional right. Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975). It is thus difficult to see how an issue relating to this subject could rise to level of "plain error."



While the policy of not reviewing claims not presented to the lower courts is not absolute, it is only in "exceptional cases" that the approach is not followed. Lawn, supra, 355 U.S. at 362, 78 S.Ct. at 324, 2 L.Ed.2d. at 337, n. 16; Duignan, supra, 274 U.S. at 200, 47 S.Ct. at 568 , 71 L.Ed. at 1000, and cases cited therein. Here, as in Lawn, there exist no "exceptional circumstances," 355 U.S. at 362, 78 S.Ct. at 324, 2 L.Ed.2d at 337, n. 16, which would remove this case from the general rule. Indeed, the facts of this case are quite similar to those of numerous other cases. See Edwards v. Louisiana, 520 F.2d 321 (5th Cir. 1975), cert. denied, 423 U.S. 1089, 96 S.Ct. 882, 47 L.Ed.2d 100 (1976); Kallie v. Estelle, 515 F.2d 588 (5th Cir. 1975), cert. denied, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391 (1975); Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975), cert. denied, 423 U.S. 990, 96 S.Ct. 403, 46 L.Ed.2d 309 (1975); Postel v. Beto, 508 F.2d 679 (5th Cir. 1975), cert. denied, 423 U.S. 853, 96 S.Ct. 100, 46 L.Ed.2d 78 (1975). See also those cases asserted by Petitioner as being in conflict with the present case. It this seems quite apparent that this case is not "exceptional," and that it therefore presents an issue which should be reviewed by this Court, if it all, only in a case in which it has been properly presented to and passed on by, the lower courts.

Certiorari "jurisdiction was not conferred upon this court to give the defeated party in the circuit court of appeals another hearing," Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922, 924 (1923), at which he can raise a new challenge after his first has failed. The issue asserted here not having been raised below, the petition for certiorari should be denied.

B

CONSIDERATION OF THE ISSUE PRESENTED HERE WOULD CONSTITUTE THE ESTABLISHMENT OF AN EXCEPTION TO A GENERAL STANDARD WHICH HAS NOT YET BEEN ESTABLISHED AND WHICH WOULD BIND THIS COURT TO A CONCLUSION WHICH MIGHT OR MIGHT NOT BE DESIRABLE WHEN THE BROADER UNRESOLVED ISSUE IS ULTIMATELY CONSIDERED.

Even if Petitioner had previously raised his present claims, however, the conclusion would still be called for that certiorari should not be granted in this case.

As Petitioner has noted, various circuit courts have adopted differing standards to be applied when a claim is made regarding ineffective representation of counsel. This fact does not, however, mean that certiorari should automatically be granted simply because a given circuit court opinion deals, as here, with such a claim.

The question of whether certiorari should be granted is of course purely a discretionary one, Supreme Court Rule 19: Durham v. United States, 401 U.S. 480, 91 S.Ct. 858, 28 L.Ed. 2d 200 (1971), which depends on "numerous factors other than the perceived correctness of the judgment. . .[this Court is] asked to review," Ross v. Moffitt, 417 U.S. 600, 616-617, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341, 354 (1974), and which is exercised only "sparingly." Hamilton-Brown Shoe Company v. Wolf Bros. & Co., 240 U.S. 251, 258, 36 S.Ct. 269, 271, 60 L.Ed. 629,633 (1916).

Petitioner's argument in support of his petition is essentially an attack on the correctness of the lower court's opinion in light of other standards employed by other circuits.



His assertions, which Respondent does not concede, should not be considered a sufficient basis for the granting of the petition here, as the present case presents a factual situation which should not be considered by this Court until such time as this Court has dealt with and established general standards to be applied in this area of the law.

The present case deals with an allegation of ineffective appellate counsel. It therefore is concerned with a right which, although certainly not unimportant, is clearly not as basic as is the right to the effective assistance of trial counsel.

Indeed, the right to a fair trial is one of the most fundamental constitutional rights, protected in various manners by numerous provisions of the Constitution. No portion of the Constitution, however, specifically mentions the rights of a defendant on appeal. Quite to the contrary, in fact, this Court has, as noted in Section A of this brief, long held that there is no federal constitutional right to state appellate review of state criminal convictions. Estelle Dorrough, supra; McKane v. Durston, supra.

Clearly, therefore, the right to effective appellate counsel does not assume the same significance as does the right to effective trial counsel. This less fundamental nature of effective counsel on appeal was recognized in Bonds v. Wainwright, 564 F.2d 1125 (5th Cir. 1977), vacated en banc on other grounds, 579 F.2d 317 (5th Cir. 1978), in which, dealing with a question regarding waiver of the right to effective counsel, the court noted that while it might hesitate to give effect to a waiver that purported to permit a trial counsel to fail to prepare a defense, a waiver of effective assistance on appeal "is far less drastic." 564 F.2d at 1131.

It may thus be said that whatever standard is to be applied in reviewing a claim of ineffective trial counsel, a less stringent standard would apply to the situation presented here, a claim regarding appellate counsel.

Yet, this Court has never established the appropriate basic standard, the standard to be applied to a claim of ineffective trial counsel, a claim dealing with the most basic of rights in this area of the law. Respondent submits that such a standard should first be established before the question of what the more lenient standard regarding appellate representation should be. To do otherwise would be to carve out an exception to a rule which has not yet been determined and to therefore put this Court in a situation in which it would be, at the time it ultimately considers the basic standard in an appropriate case, bound by a preexisting precedential impediment to a full analysis of the issue. It would be a classic case of "putting the cart before the horse."

It would not be appropriate to consider the larger issue in the context of this case, since the facts here do not present the issue. It is well established that this Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Liverpool, N.Y. & P.S.S. Co. v. Emigration Comrs., 113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899 (1885); Ashwander v. Tennessee Valley Authority, 297 U.S.288,346-347,56 S.Ct. 466, 483 , 80 L.Ed. 688, 711 (1936), Brandeis, J., dissenting in part. Similarly, the"'special and important reasons'" needed to support a grant of certiorari "imply a reach to a problem beyond the academic or the episodic 'especially' where the



issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897, 901 (1955). Resolution of the more basic question involved would therefore be inappropriate here and should "await a day when the issue is posed less abstractly." The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184, 79 S.Ct. 710, 713, 3 L.Ed.2d 723, 726 (1959), reh. denied, 359 U.S. 999, 79 S.Ct. 1115, 3 L.Ed.2d 986.

It may therefore be said that since consideration of the issue Petitioner urges at this time would, no matter how it is decided, hamstring this Court when it considers the question of the greatest importance as regards the right to effective representation, and since that question would not be a proper one to resolve in this proceeding, policy reasons indicate that the issue presented here should be considered only at such time as there exists a basic standard against which this less fundamental nature of the right involved here can be weighed and that certiorari should be denied.

C

THE STANDARDS DISCUSSED IN THE CASES CITED BY PETITIONER HAVE NOT DEALT WITH THE ISSUE PRESENTED HERE IN LIGHT OF A SUBSEQUENT DECISION BY THIS COURT AND RESOLUTION OF THE ISSUE HERE SHOULD AWAIT SUCH CONSIDERATION BY THE LOWER COURTS.

Petitioner has asserted that conflict exists between the opinion in the present case and those in other cases, decided by other federal appellate courts, alleging that a contrary result might have been reached under the standards adopted in the other cases.

It is important to realize that in none of the cases cited by Petitioner was the influence of the sentiments expressed by this Court in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), taken into account in molding the standard to be employed.[2]

In Faretta, this Court dealt with the issue of whether a defendant has the right to represent himself at a criminal trial. In reaching an affirmative answer to this question, this Court noted that "whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" 422 U.S. at 834, 95 S.Ct. at 2541, 45 L.Ed.2d at 581, n. 46.

This statement raises a number of questions regarding challenges, such as that raised here, to representation provided by privately retained attorneys. A defendant under such circumstances chooses the person to represent him just as much as does a defendant in the situation dealt with by Faretta. Likewise, the state is as powerless to insist that an attorney not be employed, even when he is known to be incompetent, as it is to insist that a defendant accept appointed representation. Thus, the question of whether a defendant who engages private counsel also waives his right to consideration of a claim of ineffectiveness is one which must be considered in light of Faretta. If a complete waiver is not found, then the question that must be considered is what effect a defendant's decision in this regard has on the standard to be employed. Surely, the exercise of a right by a defendant regarding a matter over

[2] Each of the cases cited by Petitioner as being in conflict were decided prior to Faretta, except for Boyd v. Cowan, 519 F.2d 182 (6th Cir. 1975), which was decided two days after Faretta. It is apparent, however, from the opinion in Boyd, that the court did not take Faretta into account.



which the state has no control is a matter which must be taken into account in establishing the standard to be employed, particularly when, as here, the alleged infirmity in the representation was not known to the State. 594 F.2d at 162.

Yet, this factor, and the questions raised by Faretta as regards private counsel, were not considered in the cases cited by Petitioner as conflicting with the present case. Moreover, it does not appear that any of the courts which decided those cases have subsequently assessed the impact of the matters discussed here on the standard adopted.[3]

Respondent submits that consideration of this issue at this time should therefore be considered premature. This Court would be reviewing the issue in light of standards adopted prior to a decision of this Court that is of significant import. Such review would by its very nature be undertaken without benefit of assessment by any appellate court of the proper standard in light of all the relevent precedent of this Court. Moreover, it would anticipate a conflict of standards that might not even exist after due consideration of the issue at the appellate level.

In an opinion respecting the denial of the petition for writ of certiorari in State of Maryland v. Baltimore Radio Show, 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562 (1950), Mr. Justice Frankfurter expressed sentiments regarding some of the reasons for which this Court might choose to deny

[3] In the present case, Respondent argued to the circuit court that the standard it adopted for considering claims of ineffective representation by private counsel when no state action is shown, a requirement that "fundamental unfairness" be demonstrated, Fitgerald v. Estelle, supra, is no longer valid in light of Faretta. (See Respondent's brief on appeal, Respondent's Appendix, pp. 47-90 at 77-80).
In its opinion, the court found that such unfairness did not occur and thus did not discuss the effect of Faretta.

certiorari in a given case, including that with which this discussion is concerned.

> Pertinent considerations of judicial policy here come into play. . . .It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.
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> 338 U.S. at 918, 70 S.Ct. at 255, 94 L.Ed. at 566.

Similarly, this Court has stated that "in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." Rice v. Sioux City Memorial Park Cemetery, supra, 349 U.S. at 77, 75 S.Ct. at 618, 99 L.Ed. at 903.

In addition, it is important to remember that this Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply adminstrative or managerial." The Monrosa v. Carbon Black Export, Inc., supra, 359 U.S. at 184, 79 S.Ct. at 713, 3 L.Ed.2d at 726. This judicial function is best served by review undertaken only after assessment by the appellate courts of the question involved, and a determination at that time of a need for this Court to act. Since the lower courts have not had the opportunity to make the necessary assessment, this Court should decline to accept jurisdiction.

D

A DEVELOPMENT IN FLORIDA LAW SUBSEQUENT TO THE OPINION SOUGHT TO BE REVIEWED HERE DEMONSTRATES THAT PETITIONER HAS NOT EXHAUSTED HIS STATE REMEDIES AND THAT HE IS THEREFORE NOT ENTITLED TO FEDERAL HABEAS CORPUS RELIEF.



Subsequent to the decision of the Fifth Circuit in the present case, a development in Florida law has established another reason why certiorari should be denied. The significance of this development can best be shown in the context of the arguments Respondent has advanced in the lower courts.

1. General Background

Respondent has consistently maintained throughout the lower court proceedings that Petitioner has not exhausted his state remedies. (See Memorandum of Law and Motion to Dismiss filed in district court, Respondent's Appendix, pp. 91-100, and Respondent's brief on appeal, Respondent's Appendix, pp. 47-90). It is of course axiomatic that when such exhaustion has not occurred, federal habeas corpus relief is inappropriate. Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

This argument has been based on the assertion that Petitioner should be required to present his claims to the Florida Supreme Court for its consideration. That court last discussed the treatment to be given to claims of ineffective private representation in 1967, in Cappetta v. Wainwright, 203 So.2d 609 (Fla. 1967), concluding that such a claim did not set forth a basis for relief, and relying in part on a decision of the Fifth Circuit, King v. Wainwright, 368 F.2d 57 (5th Cir. 1966), which had utilized a standard which is no longer accepted by that court. Compare Fitzgerald v. Estelle, supra, in which the court established the present standard in an en banc opinion.

The Florida Supreme Court is the only state court in Florida with the authority to modify or overrule its own

decisions. Gilliam v. Stewart, 291 So.2d 593 (Fla. 1974). Both the Florida appellate and trial courts are bound by the pronouncements of the Florida Supreme Court until the latter court reconsiders an issue in a subsequent case. State v. Lott, 286 So.2d 565 (Fla. 1973); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). On the other hand, the Florida courts are not bound by decisions of federal appellate courts. Bradshaw v. State, 286 So.2d 4 (Fla. 1973), cert. denied, 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 225 (1974); Stonom v. Wainwright, 235 So.2d 545 (Fla. 1st DCA 1970).

Thus, ever since the decision in Cappetta, the only state court in Florida which could grant relief on a claim such as that presented by Petitioner has been the Florida Supreme Court. Yet, Petitioner has never sought relief from that court.

Respondent is certainly aware that a petitioner who seeks federal habeas corpus relief is not required to exhaust his state remedies when doing so would be futile. St. Jules v. Savage, 512 F.2d 881 (5th Cir. 1975); Layton v. Carson, 479 F.2d 1275 (5th Cir. 1973); Davis v. Smith, 430 F.2d 1256 (5th Cir. 1970). Indeed, in Layton v. Carson, supra, the court noted that a federal district court need not dismiss a habeas corpus petition for lack of exhaustion of the highest court of a state has recently rendered a decision adverse to the petitioner in an identical case "and if there is no reason to believe that the state court will change its position." 479 F.2d at 1276.

Thus, Respondent has not contended that a Florida prisoner is always required to seek relief in the Florida Supreme Court when that court has previously decided a given issue in a manner contrary to the position taken by the prisoner. Rather, Respondent has maintained that such presentation should have been required here because of the unique circumstances of this case which do give reason to



believe that the state court will change its position.

A full discussion of these circumstances is contained in Respondent's appellate brief, Respondent's Appendix, pp. 64-75, and will not be repeated here, since Respondent's position at this time is based primarily on developments which took place subsequent to the decision which Petitioner seeks to have reviewed. Briefly summarized, however, Respondent's argument as to the circumstances has been based on the passage of time since the Florida Supreme Court last dealt with the issue, the changes in the federal law that have occurred over that period of time, the previous history of the Florida Supreme Court in adopting constitutional positions taken by the federal courts, the indications by the Florida appellate courts of a desire to change the standard and the changing composition of the Florida Supreme Court.

2. The Recent Development

It has recently become apparent that the Florida Supreme Court is indeed willing to undertake a reevaluation of its reasoning in Cappetta, thus demonstrating that Petitioner has in fact failed to exhaust his state remedies. This fact, as will be demonstrated, became clear after the filing of the Fifth Circuit's opinion in the present case, which was filed on May 1, 1979.

On January 26, 1979, Chief Judge George C. Young of the United States District Court for the Middle District of Florida, in the case of Vagner v. Wainwright, 473 F.Supp. 436 (M.D. Fla. 1979), dismissed the case for failure to adequately exhaust state remedies, concluding that the petitioner there should be required to present his claims of ineffective private representation to the Florida Supreme Court, basing the conclusion on essentially the same rationale as that asserted by Respondent in the lower courts in this case.

On Feruary 8, 1979, Vagner filed a petition for habeas corpus relief in the Florida Supreme Court. (Respondent's Appendix, pp. 101-111). On February 26, 1979, that court issued an order denying relief. (Respondent's Appendix, p. 112). The state then filed a pleading entitled "Extraordinary Motion for Rehearing," (Respondent's Appendix, pp. 113-115), pointing out the circumstances by which the case reached the court and the need to determine whether Cappetta is still valid.

Following the Florida Supreme Court's denial of his petition, but before its ruling on the state's extraordinary motion for rehearing, Vagner instituted an appeal to the Fifth Circuit Court of Appeals from the order dismissing his federal habeas corpus petition. Acting on a motion to expedite appeal and for appointment of counsel, that court, on June 1, 1979, filed an opinion (Respondent's Appendix, pp. 116-117; Vagner v. Wainwright. 597 F.2d 770 [5th Cir. 1979]) remanding the case for consideration on the merits, holding that in light of the Florida Supreme Court's denial of his petition, Vagner had exhausted his remedies. The state filed a petition for rehearing, (Respondent's Appendix, pp. 118-119), pointing out that Vagner's state petition was still pending on the state's request for rehearing. While that petition was pending, the clerk of the Florida Supreme Court sent a letter to Vagner, (Respondent's Appendix, p. 120), informing him that that court had granted rehearing. The Fifth Circuit was informed of the fact by a supplement to the state's petition for rehearing, (Respondent's Appendix, pp. 121-124), and on July 16, 1979, filed an opinion on rehearing, (Respondent's Appendix, pp. 125-126; Vagner v. Wainwright, 599 F.2d 1053 [5th Cir. 1979]), withdrawing the prior opinion and affirming the district court's dismissal on exhaustion grounds.



Also on July 16, 1979, the Florida Supreme Court entered a formal order (Respondent's Appendix, p. 127) granting rehearing, appointing counsel for Vagner, and setting a briefing schedule and a date for oral argument. In compliance with this schedule, the state filed a brief (Respondent's Appendix, pp. 129-146) in which it took the position that Cappetta should be reconsidered.

> Respondent, on behalf of the State of Florida in this case, suggests that there are valid reasons for revisiting the earlier law. [Cappetta].
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> * * *
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> Since various courts are actually examining the adequacy of privately retained counsel on their individual merits, without guidance from this [Florida Supreme] Court as to the standard to be applied, a review of Cappetta seems almost necessary.
>
> In addition to the legal arguments presented, Respondent suggests another reason to evaluate this Court's prior decision. That reason is the nature of federal-state relations in dealing with this issue, particularly in habeas corpus matters.
>
> Respondent's Appendix, pp. 137,138.

Argument was had in Vagner on November 6, 1979, and, as of the date this writing, has not, to counsel's knowledge, yet been decided.[4]

3. Effect on Exhaustion Argument

It has thus become apparent from the proceedings in Vagner that the Florida Supreme Court is amenable to consideration of claims of ineffective private representation and that Petitioner has therefore not exhausted his state remedies. This is

[4] Regarding the fact that no decision has yet been reached in Vagner, it should be noted that the case by its very nature involved not just the question of whether Cappetta is still good law, but also the question of what standard should be applied if it is not so considered and whether Vagner would be entitled to relief under that standard.

the very conclusion reached by Judge Joe Eaton of the United States District Court for the Southern District of Florida, the same court from which this case arose, in Diaz v. Wainwright, ___ F.Supp.___(S.D. Fla. 1979), case no. 79-2180-CIV-JE, order filed October 16, 1979. (Respondent's Appendix, pp. 146-150). Judge Eaton stated:

> Because of the Vagner proceedings and the imminent review of the issue of ineffective assistance of privately retained counsel by the Florida Supreme Court, the Respondent here contends that principles of comity require that the instant petition be dismissed for failure to exhaust state remedies. This court agrees that the exhaustion doctrine must now be invoked where Sixth Amendment claims of privately retained counsel are raised, until such time as it becomes clear that the Florida courts will again refuse to afford relief on this issue.
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> * * *
>
> Here, resort to the state courts would not plainly be futile in light of the procedural history of the Vagner case and the Florida Supreme Court's apparent willingness to re-examine the position it took one dozen years ago in Cappetta.
>
> Respondent's Appendix, pp. 148,149.

Given the status of the law in Florida regarding the issue with which this case is concerned, Respondent contends that this Court should reach a conclusion similar to that reached in Rice v. Sioux City Memorial Park Cemetery, supra, a case in which the state of Iowa passed a statute which was brought to this Court's attention on a petition for rehearing filed after this Court was evenly divided on the case and which had not been suggested as ground for opposing the grant of certiorari. This statute cast the issue of the case in a different light. This Court dismissed the writ of certiorari as improvidently granted, noting that any adjudication of the constitutional



claims pressed by the petitioner there would have been an adjudication under circumstances not promotive of the social consideration which inspired the Iowa legislature to pass the statute in question. 349 U.S. at 77, 75 S.Ct. at 618, 99 L.Ed. at 902. Likewise, in the present case, adjudication of Petitioner's claims would hardly promote the considerations underlying the Florida Supreme Court's reassessment of its prior precedent and the state's urging that court to revisit its earlier opinion in the name of, among other reasons, federal-state relations. These considerations also call for the conclusion that Petitioner has not exhausted his state remedies and that consideration on the merits would only lead to such a finding. It would therefore be inappropriate to grant certiorari regarding the merits of claims of the nature presented by Petitioner under the facts of this case.

## CONCLUSION

Respondent submits that for the reasons set forth in this brief, the petition for a writ of certiorari in this cause should be denied.

Respectfully submitted,

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